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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

STATE TAX COMMISSION OF UTAH, Petitioner

vs.

PACIFIC STATES CAST IRON PIPE COMPANY, a Corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR RESPONDENT

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PACIFIC STATES CAST IRON PIPE COMPANY, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR RESPONDENT

This case comes to the Court on a writ of certiorari granted October 8, 1962, (R. 100) to review the judgment of the Utah Supreme Court (R. 97) annulling and reversing an order of petitioner assessing a sales tax deficiency against respondent for the period January 1, 1957, to December 31, 1959, with interest, in the amount of $32,290.18 (R.77).

OPINION BELOW

The opinion of the Utah Supreme Court (R.88) is reported in 13 Utah 2d 113, 369 P. 2d 123 (1962).

STATEMENT OF FACTS

Respondent, Pacific States Cast Iron Pipe Company, is a Nevada corporation duly qualified to transact business in the State of Utah (R.25). The company is engaged in the business of manufacturing and selling cast iron pressure pipe, fittings, valves and hydrants. Its plant is located about three miles south of Provo, Utah. The products of the company are sold in thirteen western states, including Hawaii and Alaska (R.25). The cast iron pipe and related items manufactured by the company are sold primarily for use in waterworks and sewage systems (R.45).

Branch sales offices of the company are maintained in Los Angeles and San Francisco, California; Portland, Oregon; and Seattle, Washington. In addition to these sales offices, Waterworks Equipment Company, as respondent's sales agent, maintains sales offices in Great Falls, Montana; Pocatello and Boise, Idaho; and Ogden, Richfield and Salt Lake City, Utah. Dana E. Kepner Company of Denver, Colorado, also acts as respondent's sales agent in the territory comprising the States of Colorado, New Mexico and part of Wyoming (R.25).

The Sales Contracts Here Involved Were Negotiated By Respondent's Out-Of-State Sales Agents.

The sales contracts here involved, subject to home

office approval, were negotiated by respondent's sales agents, Dana E. Kepner Company and Waterworks Equipment Company, at their out-of-state sales offices having sales jurisdiction over the particular territories to which the out-of-state shipments were made (R. 75, 149, 170, 195, 249).

Petitioner's own Finding of Fact (No. 8) in this connection, stated as follows:

> "8. *That the sales in question in most cases were negotiated by representatives of the (respondent) outside of the State of Utah* (R. 75)." (Italics supplied).

Respondent's Products Are Sold For Use To Contractors On Waterworks Or Sewage Jobs Of Governmental Agencies In Accordance With Detailed Engineering Plans And Specifications.

Respondent's products are sold mainly for use on jobs of governmental agencies or units in accordance with detailed engineering plans and specifications covering the particular waterworks or sewage job (R. 26). The jobs are in most cases advertised in a newspaper publicly for the submission of bids by contractors on some specified date following the date of publication (R. 26). Some of the company's business involves sales to real estate subdivisions for water and sewer mains but such sales are likewise made in accordance with detailed engineering plans and specifications and on the basis of sealed bids (R. 26-7).

When a job is advertised or let for bid, respondent's sales agents immediately get in touch with the engineer in charge of the job to ascertain the names of the contractors

who have taken out copies of the plans and specifications or who may be interested in bidding on the job. Respondent makes up a list of the cast iron pipe, valves, fittings and hydrants precisely as set forth in the plans and specifications for the purpose of preparing its bid for such materials to all contractors bidding on the particular job (R.45, 153, 171, 199).

The transactions here in question are typified by Exhibits 4 (R.101), 5 (R.159), 6 (R.179), and 7 (R.206), which include portions of the detailed plans and specifications.

The Products Here Involved Were Purchased For Use On Specific Out-Of-State Jobs And Were Of Specific Sizes And Lengths To Conform To The Specifications Covering The Particular Out-Of-State Jobs.

The petitioner itself found as a matter of fact on the evidence (Finding No. 9) as follows:

> "9. *That the materials so purchased were purchased for use on specific out-of-state jobs and were of specific sizes and lengths to conform to the specifications covering the particular out-of-state jobs* (R.75)." (Italics Supplied).

All Of Respondent's Sales Of Pipe Are Made On The Basis Of Delivered Prices To Job Site.

All prices are figured and quoted to contractors by respondent on the basis of prices of the material delivered to the specific location of the job site where the pipe is to

be used and placed in the ground (R.26, 45). The quotation form of respondent to contractors shows the bid date, identifies the quotation to the specific governmental or other engineering project involved lists in detail the specific items of material and their prices delivered to the job site as shown in the engineering plans and specifications and shows the location of the job site where the material is to be delivered by respondent (R. 45-6, 147, 169, 195, 243). The delivered prices so quoted by respondent include freight at the regular established tariff rates, to job site destination (R. 27, 46).

Historically, in the cast iron pipe industry, for many years, all sales of pipe have been made and priced on the basis of the pipe company delivering the pipe at the point of use of the material. This is because the customer desires it that way. The customer is not interested in pipe at a foundry but in pipe in the specific sizes and lengths required for the job at the particular job site where the pipe is to be installed in the ground (R. 28-9). All prices are quoted by respondent and its competitors on the basis of competitive conditions at the job site (R.29, 30). No jobs are bid or sales made by respondent on the basis of prices delivered to a customer at the foundry; all jobs are bid on the basis of respondent selling and delivering pipe to a specified job site location where the pipe is to be used (R.28-9, 45-6).

Collection remedies and the Robinson-Patman Act have also compelled respondent to adhere strictly and uniformly to a delivered price system (R.29, 30). Practically all customers of respondent pay for the pipe out of the proceeds of the job on which the pipe is used (R.29). To insure collection of its sales accounts, respondent must constantly rely and be in a position in each case to enforce its rights

under the contractor's bond, where the job is a bonded one, or under the mechanic's lien laws of the state where the material is delivered and the job site located (R. 29, 49, 62-3). In connection with each order, the Sales Department is required to secure the name and address of the bonding company, if the job is bonded, or an exact legal description of the real property in which the pipe will be buried in order that a mechanic's lien for the purchase price of the material furnished may be promptly filed and suit instituted for collection (R.63). Each individual job is followed very closely to determine if the contractor has been paid by the owner of the real property or the governmental unit involved and if payment is not forthcoming, the bonding company is immediately notified or legal proceedings for the filing and foreclosure of a mechanic's lien instituted against the property (R.63). Respondent under its established sales practice has never experienced any difficulty in its lien foreclosure proceedings or collection suits against bonding companies, to prove that pipe and related materials were actually delivered by respondent to a particular job (R. 49, 63). If respondent followed some other selling method as, for example, selling pipe to a customer at the foundry without the contractual obligation to deliver to a particular job site, respondent would not be able to utilize the collection remedies available under mechanic's lien laws or under bonds required to be furnished by contractors on jobs where the pipe is actually used (R. 29).

Further, under the Robinson-Patman Act it is believed necessary by respondent to quote all prices on the sale of pipe at the point of delivery and use of the material and never at the foundry for the reason that it would otherwise

run grave risks of being liable for treble damages under that law for having sold to competing customers the same products at different prices (R. 30). Prices are not figured by respondent on the basis of an established foundry price at Provo, Utah, plus freight to destination but are always figured and quoted on the basis of a delivered price, including freight, to the actual job site where the pipe is to be used. Such quoted prices vary from one location to another depending on the competitive conditions respondent faces from its competitors at such points (R. 26, 45-6).

Respondent Employs Common Carrier (Truck Or Rail), Its Own Trucks Or Buyer's Trucks To Effect Delivery

Under the contractual and sales arrangements in effect between respondent and its customers, respondent effects the delivery of its products to the customer at the job site by means of common carrier, truck or rail, or in some cases involving remote or isolated locations, its own trucks, or, in some instances it may employ and pay the customer the regularly established common carrier tariff rate to haul the material to the job site (R. 27, 31, 47). The assessment herein involves and covers only those sales transactions where respondent employed the buyer to transport on respondent's behalf the pipe to the out-of-state job site location (R. 6, 31). Irrespective of which method of delivery is employed, respondent has "the responsibility for delivering the pipe or itself handling all arrangements for the delivery of the pipe and retains exclusive and sole control over such arrangements" because, among other things, respondent's reputation is, in the long run, dependent on getting the pipe to the job site in satisfactory condition (R. 31).

Respondent, in most cases, would not permit the buyer to haul the pipe which he is buying (R. 31). This is only permitted where respondent is reasonably satisfied that the buyer has adequate transportation facilities to effect the delivery and adequate insurance covering the possibility of any damage or loss en route during the interstate haul to the out-of-state job location (R. 31, 68).

Respondent Pays The Freight In All Cases To The Point Of Delivery And Use Of The Product.

All prices quoted by respondent include freight at the regularly established tariff rate to the point of delivery and use at the out-of-state job site (R. 27, 46, 48, 63). Respondent maintains at its Provo offices a list of common carrier truck and rail rates covering most requirements. Rates not there available are secured through respondent's Traffic Department located in Salt Lake City, Utah (R. 46). Respondent is in all cases, regardless of the method of effecting delivery whether by common carrier, its own trucks or customer trucks, responsible for the payment of freight (R. 48). The freight is paid by respondent either by direct payment to the carrier, called prepaid shipments, or by way of an allowance or credit against the delivered prices invoiced to the customer where, as in some cases, the customer may desire to pay the freight or, where, as in the cases here involved, the customer desires and is employed by respondent to haul the material to the out-of-state job site at the established tariff rate (R. 48, 63).

On respondent's invoices, where the freight is prepaid, the invoices so state and the full delivered price, including

freight is billed to the customer. Where freight is allowed, in lieu of a cash payment to the customer, a deduction for the amount of the freight is made by respondent against the agreed delivered prices which include freight to destination, and the net amount billed to and paid by the customer (R. 62-3, 68, 71-2).

Under Respondent's Sales Practices, And The Contractual Documents Relating Thereto, Respondent Is Obligated To Deliver The Material To The Out-Of-State Job Site.

Although the Utah Supreme Court concluded (R. 89) that the "contract called for out-of-state shipment" and that the "bill of lading and contract of sale clearly demonstrated an understanding by both seller and buyer that the pipe was to be shipped to an out-of-state destination," some of the facts and evidence of record on this point will be re-examined here to show that no other conclusion was possible under the circumstances of the case.

Regardless of the specific method of delivery employed by respondent, i.e. whether by common carrier, truck or rail, by customer's truck or by its own trucks, respondent under its established sales, pricing and delivery practices and all of the various contractual documents relating thereto, is definitely obligated both legally and in fact to effect a delivery of the material to the customer at the job site whether out-of-state or in-state.

For example, Mr. E. J. Nelson, General Manager of respondent testified as follows:

"Q. In the case of all sales of the company's products

and especially those here involved, is the company obligated under its contractual arrangements to deliver the material to the job site? (R. 27).

(Then follows the ruling of the Commission, after objection, that such testimony is properly admissable.)

"A. The answer will be that all jobs are bid on the basis of my company selling and delivering the pipe products to the specified job site locations, and delivery by the company to the job site is an essential part of the sale (R. 28)."

Again,

"Q. In your foregoing testimony, you indicated the pricing and selling method followed by the company is a matter of company policy?

"A. Yes, sir, that is correct. In my position as General Manager it is a part of my duty and responsibility to see that all sales of products of my company are always and invariably priced and sold on a delivered basis where the pipe is to be used, and I would emphasize here at the hearing that there is not and cannot be any question that under the contractual arrangements which we enter into with our customers that our company is definitely and clearly obligated to deliver the pipe to the customer at the job site (R. 30)."

Again,

"Q. Mr. Nelson, you are familiar with the transactions that are involved in the proposed sales tax assessment involved here, are you not?

"A. Yes, sir, I am familiar with the assessment and I would state that all of the transactions that are sought to be taxed here involve what our company regards as interstate commerce. That is, all of the sales covered by the assessment reflect shipments across the state line to customers on out-of-state jobs. They involve sales of pipe in the specific quantities and in the specific sizes as required by the plans and specifications of the engineer covering the particular job. All of the sales actually crossed state lines and again I would state unequivocally under oath that my company is obligated to deliver the goods to the out-of-state location in performing its contract to sell such goods.

In other words, the delivery is an integral, necessary and obligatory part of the sales contract . . . (R. 30-1)".

Again, on cross-examination by petitioner's counsel:

"Q. You stated in your testimony that he was obliged to deliver the pipe out-of-state and I wonder what type of a contractual obligation he has to deliver the pipe out of state?

"A. Well, in bidding on a job, we bid on the job delivered at this particular job site and when he uses his own equipment for the delivery, we, of course pay him or allow him for whatever the current rate would be, traffic rate, for the material delivered to the job site.

* * * *

"Q. (By Mr. Howard) When he picks up the pipe at your plant, he signs a bill of lading, is that right?

"A. Right, yes, sir (R. 35-6)."

Again,

"Q. (By Chairman Gunther) Mr. Nelson, exploring this just a little fu her, you indicated earlier in your testimony that on occasion you hire the purchaser to act as your agent to transport goods to the job site?

"A. Yes, sir.

"Q. Now is it our understanding that at the moment you have him sign this bill of lading; that in effect is a contract to him then to act as your agent, you have hired him at that moment?

"A. Yes, sir, to deliver the pipe to this job site (R.36)".

Mr. Glade Anderson, Sales Manager of respondent, testified as follows:

"Q. In effecting the delivery, are bills of lading employed in all classes of delivery?

"A. Yes, sir, they are. We issue a uniform domestic straight bill of lading and this shows our own name as the shipper and it always lists the name of the party who is receiving the pipe and the final destination where it is going.

"Q. And in all of the cases here involved, where the buyer was utilized to effect the delivery to the out-of-state job site, were bills of lading in all cases used by the company and signed by the buyer?

"A. Yes, sir, they were (R. 47-8)."

Mr. O. H. King, Jr., Asst. General Manager of respondent, testified as follows:

"Q. In the cases here involved, Mr. King, where the buyer is utilized to effect the out-of-state delivery, does such a buyer acquire at the foundry an unrestricted right of possession to the material?

"A. Not as far as we are concerned, he does not. He is acting to deliver the material to the specific job for which he and ourselves have entered into a sales and purchase contract (R. 54)."

Again,

"Q. The Commissioner referred to the Page, Arizona, job on which Mr. Clyde was the contractor. In the pipe which went into that particular job, were bills of lading in all instances signed by Mr. Clyde's drivers?

"A. Yes, sir, they were.

"Q. And did those bills of lading show on their face, Page, Arizona, as the destination of the material?

"A. They did.

"Q. And was Mr. Clyde paid the regularly established tariff freight rate for that haul?

"A. Yes, sir, he was (R. 60)."

The contractual documents covering the class of sales transactions included in the assessment were admitted in

evidence as Exhibits 4 to 7, inclusive. They are typical of all the jobs wherein purchasers were employed by respondent at the established freight rate to transport the material to the out-of-state job site (R. 72). Each numbered exhibit consists of (a) the engineering plans and specifications and contractual documents relating to and covering the specific project, (b) copy of respondent's quotation to all contractors bidding on the job, (c) miscellaneous papers or correspondence with respondent's out-of-state sales office relating to the preparation of respondent's bid to be made on the job, (d) bill of lading covering consignment by respondent of material to the out-of-state job site, and (e) respondent's invoice to the customer covering materials shipped to the job. The exhibits cover shipments of material by respondent to the following out-of-state jobs, typical of all the transactions here involved:

Exhibit 4—Platte Canyon Water and Sanitation District, Littleton, Colorado—Specifications for Construction of Steel and Cast Iron Pipelines on South Sheridan Boulevard and Adjoining Streets—July, 1959—Specifications No. 19-201 (R. 101).

Exhibit 5—Pueblo Municipal Sewage Disposal Plant, Pueblo, Colorado—Contract Documents 1957—Furnishing of All Labor, Material and Equipment For and the Construction of Secondary Treatment Structures, Equipment, and Appurtenances, at the Pueblo Sewage Disposal Plant (R. 159).

Exhibit 6—Town of Farmington, New Mexico—Municipal Utilities Improvements-1959-T—Specifications and Contract Documents (R. 179).

Exhibit 7—Access Roads, Streets and Utilities for Page,

Arizona—Glen Canyon Unit, Arizona-Utah, Middle River Division, Colorado River Storage Project—United States Department of The Interior, Bureau of Reclamation—Specifications No. DC-4896 (R. 206).

The engineering plans and specifications, Exs. 4(a) to 7(a), inclusive, set forth the details of the job, its precise location, the specific sizes and lengths of cast iron pipe and number and types of related items needed for the job, specifications of the pipe and how and where the pipe is to be laid in the ground, how the line of pipe is to be tested and inspected after laying, forms of the various contractual documents involved, such as notice to bidders, instructions to bidders, bid bond form, performance bond form, contract, etc. (R. 101, 159, 179, 206).

Respondent's quotations to the contractors bidding on the subject jobs are contained in Exs. 4(b) to 7(b), inclusive. These quotations on their face show the name and out-of-state location of the job, the bid date, and the prices delivered to the job site of the various sizes and lengths of pipe and types of fittings, which list of materials is taken from and tied exactly into the materials listed and shown in the engineer's plans and specifications (R. 46). The prices quoted are shown as delivered prices to the job site, f.o.b. foundry and with full truckload freight allowed to destination. Unloading from truck is the responsibility of the customer (R. 147, 169, 195, 243).

Exs. 4(c) to 7(c), inclusive, show from correspondence of the sales offices that prices are prepared and quoted by respondent on the basis of common carrier truck delivery

to the job site, including freight to destination (R. 150, 171, 198, 250).

Exs. 4(d) to 7(d), inclusive, consist of standard domestic forms of bills of lading employed by respondent in all classes of delivery, including the class of customer truck shipments here involved (R. 48). The bill of lading shows respondent's name as consignor, shows the customer's name as consignee, shows the job site location by town and state under "Destination," uses the word "Called" under "Route," describes the number, sizes, lengths and type of pipe shipped and its weight, and is signed by an agent of respondent as shipper and by the customer's truck driver as agent for the carrier. Under the language of the bill of lading, the customer receives from respondent at Ironton, Utah, "the property described below. . . marked, consigned, and destined as indicated below, which said company . . . agrees to carry to its usual place of delivery at said destination . . ." Each bill of lading has an attached weight tally and on the face of the bill is stamped and written the amount of freight in dollars and cents to be allowed and credited to the customer for the out-of-state haul (R. 154, 174, 201, 259).

Exs. 4(e) to 7(e), inclusive, consist of respondent's invoices for the material sold and delivered to the customer to and for the out-of-state job. The invoices show on their face the name and address of the customer, the name and the out-of-state location of the project to which the material has been shipped and the out-of-state final destination of the material (R. 157, 177, 204, 262). For example, Ex. 4(e) (R. 157), which is typical, shows:

"SOLD TO Warner Brothers Company
5505 Vance St.
Arvada, Colorado

"SHIP TO Same: Platte Canyon Water &
Sanitation District
Littleton, Colorado

"FINAL DESTINATION LITTLETON, COLO
"TERMS 30 DAYS NET
"ROUTE CALLED
"F.O.B. FOUNDRY FRT. ALLOWED AT
17.20 N.T.

The description and quantity ordered are shown in the first column, next the quantity shipped in pieces and feet, next the unit price, and next the total price delivered to the job. Freight payment to the customer and collection of Colorado Sales and Use Tax are handled as follows:

	AMOUNT
	2441.58
	2441.58
LESS FRT. ON 33651 LBS.	289.40
	2152.18
2% COLO. TAX	43.04
	2195.22

Respondent's Sales Documents Provide For Passage Of Title F.O.B. Foundry, Regardless Of The Method Of Delivery Employed, Which Is Not Inconsistent With Its Contractual

Obligation To Effect A Delivery Of The Material To The Out-Of-State Job Site.

Respondent's standard form of quotation to all contractors bidding on a specific out-of-state job will normally provide that the prices quoted are f.o.b. foundry with full freight allowed to destination. For example, the quotation on the Platte Canyon Water and Sanitation District job at Littleton, Colorado (R. 148), provides:

> "The prices quoted herein are f.o.b. our foundry at Ironton, (Provo), Utah with full present 35,000 lbs. truckload freight allowed to Littleton, Colorado; therefore these are delivered prices."

Whether the provisions attempting to pass technical legal title to the customer f.o.b. foundry are fully effective in all cases is debatable (R. 21-2, 50). The provisions are inserted for the purpose of putting respondent in a little better position in the event of damage to the material in transit and to help insure more careful unloading and handling of the pipe by the customer alongside trenchsite at the out-of-state point of destination (R. 50). Irrespective of the question upon whom lies the technical "responsibility" for filing a claim for any damage in transit against the common carrier or insurance company, respondent, and not the customer, in practice and in fact handles through its traffic department practically all claims for loss or damage during interstate transit of the material (R. 39, 50).

Respondent retains exclusive control over all shipping arrangements and will not permit a customer to haul material to a job site unless satisfied he has adequate transport

facilities and insurance covering any damage to the material in transit (R. 31).

Mr. Nelson testified:

> "Also, I would point out that we do not and would not in most cases permit the buyer to haul the pipe which he is buying. We only permit this where we are reasonably satisfied that he has adequate transportation facilities to effect the delivery and adequate insurance covering the possibility of any damages or loss en route during the interstate haul to the out-of-state job location (R. 31)."

Mr. W. W. Clyde, of W. W. Clyde Construction Company, contractor on the Page, Arizona job (R. 206), for example, testified that he requested permission from Mr. Nelson, respondent's General Manager, to transport the pipe down to the job at Page, Arizona, on his transports for the established tariff of $22.40 per ton (R. 68). He desired to do this to help offset a $6.00 increase in the price of the pipe made necessary under an escalator clause in respondent's quotation increasing the price in the event of an increase in the price of pig iron (R. 249). Mr. Clyde had adequate insurance to cover any losses or damages to the pipe in transit to Page, Arizona (R. 70). Mr. Clyde's impression of the transaction, from a practical business standpoint, was that the prices quoted by plaintiff being delivered prices, prices were all f.o.b. Page, Arizona (R. 67-69). He testified that some of the materials went to the Page job by truck common carrier (R. 68-9). The material which he hauled was all transported to the Page, Arizona job site under uniform bills of lading signed by his truck drivers as agent (R. 71). He was paid $22.40 per ton freight for the

haul which was paid to him by respondent not in cash but by way of credits against the delivered prices to Page, Arizona (R. 60, 68, 72).

All Of The Shipments Here Involved Were Shipped Across The State Line To The Out-Of-State Job Site According To Contract And None Were Diverted To Local Intra-State Use.

All of the sales here involved were actually and in fact delivered according to contract across the state line to the out-of-state job sites (R. 54). Mr. O. H. King, Jr. testified:

"Q. Were there any instances that are involved here of sales that were not shipped and delivered to the out-of-state job sites in accordance with the contracts?

"A. All instances here under discussion were consummated as contracted (R. 54)."

None of the contracts of sale here involved requiring for their performance the out-of-state delivery to job site of the material being purchased were violated or breached and the material diverted to local intra-state use by the customer or for sale or use by the customer on any other job other than the one for which the material was specifically purchased by the customer (R. 31, 48, 54). Respondent has been legally advised that it has adequate legal remedies against a customer to prevent any breach of contract under which the customer might attempt to divert the property to local intra-state use (R. 32).

The Bulk Of The Interstate Sales And Shipments Here Involved On Which Utah As The State Of The Seller Is

Attempting To Assess Sales Tax Have Already Been Subjected To Sales Or Use Tax By And In The State Of The Buyer.

Although respondent's products are sold in the thirteen western states, including Hawaii and Alaska, the interstate shipments by customer truck here involved were confined to the intermountain states of Colorado, Arizona, Wyoming and New Mexico, and others to a less substantial extent (Idaho and Montana) (R. 64-5).

In the State of Colorado respondent is qualified to do business and is qualified and required to collect and remit Colorado sales and use tax on all shipments of pipe material into the State of Colorado irrespective of the particular method employed by respondent to effect delivery (R. 64).

The Colorado sales on which respondent has already collected tax from the customer and remitted the same to the Colorado Bureau of Revenue constitute 32.3 per cent of the total sales transactions which petitioner is here seeking to tax again (R. 64).

The States of Arizona, Wyoming and New Mexico each have a sales and use tax law, but in view of the fact that respondent during the period here involved was not qualified to do business or assess and collect sales and use tax in those states, the customers were required to and paid use tax on the shipments here involved into such states (R. 64-67).

The sales to Arizona, Wyoming and New Mexico on which the customer paid tax to such states constitute 36.6

per cent of the total sales transactions which petitioner is here seeking to tax again (R. 64).

68.9 per cent of the total interstate sales here involved have thus been already taxed by the states of destination (R. 64).

The balance of the sales to other states (that is, to Idaho and Montana) have not been taxed because those states presently have no sales or use tax law (R. 64). Respondent is, however, informed that these states "will soon adopt a sales and use tax," a sales and use tax law having actually been passed in the last legislative session in Idaho, but killed by veto (R. 65).

The States Of Manufacture And Origin Of Respondent's Competitors Do Not Attempt to Levy And Assess Any Such Tax As Here Proposed On Shipments To Out-Of-State Job Sites And Respondent Would Thereby Suffer A Severe Competitive Disadvantage And Injury.

All sales of cast iron pipe are made and priced on the basis of the pipe company delivering the pipe at the point of use and delivery of the material (R. 26, 45). The price of pipe thus varies from one location to another depending on the competitive conditions at the point of use (R. 26, 45).

The position of respondent in the cast iron pipe industry with respect to sales is very small (R. 33). The giant of the industry is United States Pipe and Foundry Company with, among others, a plant located at Decoto, California (R. 33). Respondent is subjected to intense competition from this point (R. 34). It also faces strong competition

from pipe manufactured in Birmingham, Alabama, and Council Bluffs, Iowa, among other places (R. 26). Freight is a significant and substantial portion of the delivered prices quoted to customers (R. 34).

Cast iron pipe is purchased regularly in all areas served by respondent and based upon past experience and accumulated tabulations of bids, respondent can guess within fairly close limits what its competitors may bid at any particular point (R. 49). Over ninety per cent of all respondent's sales are sold under bids on jobs where the price spread is less than the 2 per cent Utah Sales Tax (R. 49). Respondent's competitors do not have to pay a sales tax on pipe sold and shipped from place of manufacture to out-of state jobs and a 2 per cent Utah sales tax on respondent's out-of-state shipments as here proposed would automatically place respondent at a 2 per cent competitive disadvantage with its competitors shipping from Iowa, California, Alabama or elsewhere whether or not the state of destination has or has not a sales and use tax law (R. 51-2).

For example, Mr. W. W. Clyde testified with respect to the Page, Arizona, job as follows:

"Q. In making your bid to the government, you used the prices that were quoted to you by Pacific States?

"A. Yes, sir.

"Q. Did you, in making your estimate, include any amount therein for Utah Sales tax?

"A. We did not. We included the taxes of Arizona.

"Q. But not Utah sales tax?

"A. Not Utah (R. 67."

Although Respondent's Sales And Contractual Arrangements Are Exactly The Same In The Case Of All Sales, Regardless Of The Method Employed By It To Effect Delivery To The Job Site, Petitioner Has Here Singled Out For Tax Those Sales Delivered By Customer' Truck And Left Untouched Those Delivered By Common Carrier, Truck Or Rail, Or By Respondent's Own Trucks.

As heretofore indicated, all sales of respondent's products are shipped either (1) by common carrier, truck or rail, (2) by respondent's own equipment, or (3) by the buyer who is hired to haul the material. There is, however, no distinction whatever in respondent's contractual arrangements or documents between these three types of delivery to the job site (R. 47). The quotation forms are the same, the invoice forms are the same and the uniform domestic straight bill of lading forms are the same, irrespective of the method of delivery (R. 47-8).

Mr. Glade Anderson testified:

"Q. And is there any distinction in these contractual documents that you normally employ in your operations among these several classes?

"A. No sir, there isn't (R. 47."

Petitioner, however, here proposes to tax only those sales where shipments were effected by customer truck (R.

6, 12, 31, 72).

The Supreme Court Of Utah Has Here Found As A Matter Of Fact On The Evidence That The Sales Were Interstate Sales And Not Local Sales.

The Utah Supreme Court concluded on the evidence (R. 88), that:

(1) If the pipe had been delivered to a common carrier to an out-of-state purchaser, the sale would not have been taxable in Utah.

(2) Delivery was taken in Utah by the out-of-state purchaser in his own equipment, actually transported from the pipe company's foundry directly, and without interruption, to the out-of-state destination called for by the contract and bill of lading.

(3) The contract called for out-of-state shipment, and the pipe company set the destination price which included the common carrier freight charge between the two points.

(4) Such tariff was credited to the purchaser.

(5) The bill of lading and contract of sale clearly demonstrated an understanding by both seller and buyer that the pipe was to be shipped to an out-of-state destination.

(6) Under such contract, bills of lading and the highly detailed engineering specifications, it was quite improbable, if not almost impossible, to conclude other than that the

goods could not be diverted to any other or intrastate consumption.

(7) There was no contractual or transportational format designed to deceive anyone or to evade taxation.

(8) There was a certainty of interstate shipment.

(9) The goods all actually reached their consigned destination and none were diverted to a local use.

(10) If the goods had been diverted to local use, the most that could be said is that there would have been a contractual breach respondable in damages, and perhaps reflecting a circumstance justifying the imposition of a Utah sales tax on an intrastate transaction.

STATUTES AND REGULATIONS INVOLVED

The Utah Sales Tax Act, Title 59, Chapter 15, U.C.A. 1953, provides in part as follows:

"59-15-2

(b) The term "sale" or "sales" includes installment and credit sales, and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale and also includes the sale of electrical energy, gas, services or entertainment taxable under the terms of this act. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale.

(e) The term "Retailer" means a person doing a

regularly organized retail business in tangible personal property, known to the public as such and selling to the user or consumer and not for resale, and includes commission merchants and all persons regularly engaged in the business of selling to users or consumers within the state of Utah; but the term "retailer" does not include farmers, gardeners, stockmen, poultrymen or other growers or agricultural producers, except those who are regularly engaged in the business of buying or selling for a profit. The term "retail sale" means every sale within the state of Utah by a retailer or wholesaler to a user or consumer, except such sales as are defined as wholesale sales or otherwise exempted by the terms of this act. . ."

"59-15-4. Excise tax—Rate. From and after the effective date of this act there is levied and there shall be collected and paid:

(a) A tax upon every retail sale of tangible personal property made within the state of Utah equivalent to two per cent of the purchase price paid or charged, or in the case of retail sales involving the exchange of property, equivalent to two per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange, provided, however, that the sale of coal, fuel oil and other fuels shall not be subject to the tax except as hereinafter provided."

"59-15-5. Every person receiving any payment or consideration upon a sale of property or service subject to the tax under the provisions of this act, or to whom such payment or consideration is payable (hereinafter called the vendor) shall be responsible for the collection of the amount of the tax imposed on said sale; provided, however, that where any sale of tangible per-

sonal property is made by a wholesaler to a retailer, upon the representation by the said retailer that the said personal property is purchased by the said retailer for resale, and the said personal property thereafter is not resold, the wholesaler shall not be responsible for the collection or payment of the tax imposed on the said sale, but the said retailer shall be solely liable for the said tax. The vendor shall collect the tax from the vendee, but in no case shall he collect as tax an amount (without regard to fractional parts of one cent) in excess of the tax computed at the rates prescribed by this act, . . ."

"59-15-6. Exempt Sales. — . . . ; and all sales which the state of Utah is prohibited from taxing under the Constitution or laws of the United States, or of the state of Utah shall be exempt from taxation under this act."

The Utah Sales Tax Regulations provide in part as follows:

"2. Nature of Tax (Applies to sales tax only). — This is a transaction tax imposed upon certain retail sales of tangible personal property made within the State of Utah; . . . . The tax is not upon the articles sold or furnished, but upon the transaction, and the purchaser is the actual taxpayer. The vendor is charged with the duty of collecting the tax from the purchaser and of paying the tax to the state."

"4. Collection of tax (Applies to sales tax only). — The vendor is required to collect the tax from the vendee with respect to all taxable transactions. The tax must be added to the sales price and collected or charged as a separate item. The vendor is required to remit to the tax commission all tax funds in his posses

sion and is a guarantor of all amounts required to be collected under this act.

"31. Time and place of sale (Applies to sales and use taxes). Ordinarily, the time and place of a sale are determined by the time and place that the contract of sale is made between the seller and the buyer. However, in all cases the intent of the parties is the governing factor in determining both time and place of sale and is subject to the general law of contracts. If the contract of sale requires the seller to deliver the goods to the buyer or at a particular place or to pay the freight or cost of transportation to the buyer or to a particular place, title to the property does not pass until the goods have been so delivered to the buyer or have reached the place agreed upon. Delivery to a common carrier by the seller for the purpose of transmission to the buyer outside the state of Utah shall be deemed a sale in interstate commerce for the purposes of the sales tax act and such sales shall not be subject to the tax."

"44. Sales in interstate commerce (Applies to sales tax only). Sales made in interstate commerce are not subject to the sales tax imposed by the act. However, the mere fact that commodities purchased in Utah are transported beyond its boundaries is not enough to constitute the transaction of a sale in interstate commerce. Where the commodity is delivered to the buyer in this state even though the buyer is not a resident of the state and intends to transport the property to a point outside the state, the sale is not in interstate commerce and is subject to tax.

"In determining whether a sale is made in interstate commerce certain general principles will apply. Interstate commerce is not recognized unless there is a movement of a subject of commerce from a point

within the territorial jurisdiction of one state across the boundary line to a point within the territorial jurisdiction of another. Each of the following three rules must be complied with to constitute interstate commerce:

1. *The transaction must involve actual and physical movement of the property sold across the state line.*

2. *Such movement must be essential and not an incidental part of the sale.*

3. *The seller must be obligated by the express or unavoidable implied terms of the sale or contract to sell to make physical delivery of the property which forms the subject matter of the transaction across a state boundary line to the buyer.*

"When tangible personal property is located within the state of Utah at the time of sale and is delivered within the state of Utah such sale is taxable irrespective of where the parties to the contract of sale are located and where the contract was made or accepted or the funds paid. Where tangible personal property is located within the state of Utah at the time of sale, but delivery of the article sold is made at a destination outside Utah and where the seller of the article retains actual physical possession of the article after sale either in person or through an agent until such property is delivered to the purchaser at a destination beyond the boundary of this state such sale shall be deemed to have been made in interstate commerce and exempt from Utah tax.

"Where delivery is made by the seller to a common carrier for transportation to the buyer outside the state of Utah, the common carrier shall be deemed to be

the agent of the vendor for the purposes of this section regardless of who is responsible for the payment of the freight charges.

"If property is ordered for delivery in Utah from a person or corporation doing business in Utah the sale is taxable even though the merchandise may be shipped from outside the state to the seller or direct to the buyer."

QUESTIONS PRESENTED

The primary question presented here is whether Utah, the state of the seller, can impose a sales tax on the proceeds of interstate sales (the bulk of which have already been subjected to sales or use tax by the state of the buyer) under the commerce clause of the Federal Constitution (Art. I, Sec. 8).

Also involved, raised and argued below were the questions whether such tax denies to respondent the equal protection of the laws and deprives respondent of property without due process of law, all in violation of Section I of the Fourteenth Amendment of the Federal Constitution, together with the question whether the transactions are in any event, exempt under the technical definition of interstate commerce in the Utah Sales Tax Regulations.

In the event of the affirmance by this Court of the decision below based upon the commerce clause question, it would be unnecessary to decide the other questions. However, in the event the Utah Court's decision is reversed, it would then become necessary to remand the case for an adjudication of the other questions.

Although the decision below *"under the facts of this case"* (R. 88), on the commerce clause, was clearly correct, it is equally apparent that the tax is also invalid (1) under the due process clause for not apportioning some of the sales receipts to the out-of-state sales activities of respondent's sales agents, (2) under the equal protection clause for irrational and discriminatory classifications between different, but equally certain, means of interstate transport, and (3) under the technical Utah definitional administrative Regulations of interstate commerce, whether such Regulations actually conform to the decisions of this Court or not.

SUMMARY OF ARGUMENT

I.

The tax here sought to be levied by Utah, the state of the seller, on the proceeds of interstate sales, the bulk of which have already been taxed by the state of the buyer, is invalid and unconstitutional under the commerce clause of the Federal Constitution.

A. The decisions of this Court prohibit the seller's state from taxing the proceeds of an interstate sale.

B. The tax is not made valid by the theoretical possibility of diversion to local use by breach of contract of the purchaser to haul the goods out-of-state.

C. Infringement of the Constitution cannot be justified on grounds of administrative convenience or on theoretical difficulties of securing proof of out-of-state destination in other types or classes of cases not before the Court.

D. The granting of commerce clause protection to shipments by common carrier transport from the seller's state but denying such protection to shipments by private truck transport where the certainty of out-of-state destination is equally plain, is irrational and repugnant to the present-day transportation needs of the nation.

E. The sales here involved were interstate and not local sales, and the *Superior Oil, Wood Preserving Corporation* and *International Harvester Company* cases, relied on by petitioner, are inapplicable to the case at bar.

II.

The tax here sought to be levied would deprive respondent of property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Federal Constitution.

III.

The tax here sought to be levied would deny to respondent the equal protection of the laws in violation of Section I of the Fourteenth Amendment of the Federal Constitution.

IV.

The tax here sought to be levied is invalid under the provisions of the Utah Sales Tax Law and the Sales Tax Regulations issued thereunder.

ARGUMENT

I.

The Tax Here Sought To Be Levied By Utah, The State Of

The Seller, On The Proceeds Of Interstate Sales, The Bulk Of Which Have Already Been Taxed By The State Of The Buyer, Is Invalid And Unconstitutional Under The Commerce Clause Of The Federal Constitution.

Utah, the state of the seller, is here attempting to tax the gross receipts, without apportionment, from interstate sales of cast iron pipe into specific out-of-state governmental sewage and waterworks jobs where under exactly the same set of contractual documents, the respondent as seller paid the customer, instead of a common carrier, the established tariff rate to haul the pipe to the out-of-state job sites. A decision in favor of the state would have restricted the protection of the Federal commerce clause to common carrier shipments even though in both classes of shipment title passed f.o.b. foundry and in neither class were there any diversions to local intra-state or other use by purchaser's breach of contract. In both classes of transactions, the manifest certainty of shipment to out-of-state job site destination was equally plain.

The present case is special and unique. It was decided by the Utah Supreme Court strictly on the basis of the facts. The facts here are important and petitioner's case is haunted by the facts, including its own findings. *The petitioner itself found that the sales in most cases were negotiated by respondent's sales representatives outside the State of Utah, and that the materials so purchased were purchased for use in specific sizes and lengths to conform to the specifications covering the particular out-of-state jobs.* (Findings 8 and 9, R. 75). We do not read petitioner's brief as seeking to impeach its own findings.

The findings of petitioner need very little, if any, supplementation to show the clear and obvious interstate commerce character of the transactions.

The Supreme Court of Utah, however, did supplement these findings on undisputable evidence by holding that the sales were interstate sales at delivered prices, including freight, to the out-of-state job site locations, that the seller paid freight to the customer for the interstate haul under the contract and bill of lading to the job site by crediting the tariff to the purchaser, that the understanding and agreement of the parties required an out-of-state shipment of pipe to destination, that all of the goods reached their consigned out-of-state destinations and none were diverted to local or other use, that the contractual format was not designed to evade taxation, and that there was a certainty of interstate shipment.

It is a fact here that respondent maintained at all times complete control and responsibility over the selection of the means of transport to the out-of-state job site, whether by its own trucks or by common carrier or by customer truck. Pipe is paid for out of the proceeds of the job. For credit and collection purposes, respondent has 'to stay on top of the job every minute' and literally 'follow the pipe right into the ground' in every transaction. Cast iron pipe is heavy and expensive. Freight is a significant portion of the delivered price. All pipe is sold at a delivered price to the job-site, including freight. It is not sold at prices f.o.b. plant plus freight. Each job is a special sale. The pipe is sold on every job, big or small, for burial into a specifically known, engineered and identified job site location.

These are the facts of the case. When, in the face of these facts, petitioner attempts to argue the sales were fully consummated locally, it is arguing the facts not of this case but of some other case.

Nor can there be the slightest question that the tax here is sought to be imposed on the proceeds of these interstate sales. There is no dispute here that for the taxable period involved, petitioner's sales tax auditor went through all of respondent's sales invoices for the period and singled out for tax the sales receipts of those interstate sales which went by customer truck. The fact that all of the receipts on the same invoices had (with the exception of Idaho and Montana) already been taxed in the states of the buyer was regarded as immaterial.

There is infringement of the Congressional power to regulate commerce among the several states under the decisions of this Court where the state of the seller imposes a direct tax, without apportionment, on the gross proceeds of an interstate sale.

The right of the state of the buyer to impose a sales or use tax on such proceeds has long since been settled.*

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*Sales Taxes: Banker Brothers v. Pennsylvania, 222 U.S. (1911);
Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923);
Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1935);
McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940).

Use Taxes: Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932);
Edelman v. Boeing Air Transport, 289 U.S. 249 (1933);
Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934);
Henneford v. Silas Mason Co., 300 U.S. 577 (1937).

Permitting the state of manufacture to also tax the sales proceeds would obviously subject the interstate sale to discrimination. The sale would be burdened with two taxes if the state of market has a tax and one tax if it does not. In either event, interstate sales would be subjected to an extra tax not borne by local sales.

The state of destination or market has been given this priority over the state of origin or manufacture by reason of the nature of the tax. Sales and complementary use taxes are basically taxes on final use and consumption. Sales for resale are exempt. The tax is on the consumer. The consumer being in the state of market, it is only logical that the state of the market in which the final use and consumption is protected and takes place should levy the tax. The decisions point out that the state of manufacture through other long recognized forms of taxation (such as excise, property, income, franchise taxes, etc.) has ample and constitutionally legitimate means at its disposal to tax the manufacturing company without resort to a direct tribute on the proceeds of interstate sales. The state of the market can claim the tax on the basis of economic use and consumption of the goods within its jurisdiction. The state of the seller can point only to its desire for more tax revenue.

By every standard of fairness, Constitutional necessity and common sense, the state to which the material is shipped for final use and consumption is the appropriate locus of taxation on the consumer of such material. One of the very fundamental purposes of the commerce clause was to prevent a levy by one State on the consumers in another State. As stated in the Federalist, No. XLII:

> "A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumer of the former."

The lack of such a protective provision in the Articles of Confederation constituted a basic defect of government clearly demonstrated by experience. This is the underlying and implicit ground of the distinction, as shown hereafter, between the *Henneford* and *Berwind-White* cases on the one hand and the *Adams Mfg.* and *Gwin, White & Prince* cases on the other. All of the states have grown accustomed to this distinction. The distinction represents no mere poetical image or metaphysical abstraction. On its preservation rests the common free-trade market economy of the United States.

In the case at bar, the petitioner seeks to avoid the clear force of the constitutional prohibition by attempting to argue here that interstate commerce is local commerce. It asks this Court to determine in effect that there can be no such thing as interstate commerce unless the property moves across the state line to market by *common carrier, truck or rail.*

In the early days of this republic when there was no such thing as a pipeline, a railroad, or an airline or a truck, such a view of the commerce clause would have been sheer fantasy. The founding fathers never intended the com-

merce clause to be restricted to any particular mode of transportation. Nor can petitioner point to even one decision of this Court since the beginning of the republic to support its ill-advised attempt here to restrict the constitutional protection of interstate commerce to truck and rail common carrier transport.

A.

The Decisions Of This Court Prohibit The Seller's State From Taxing The Proceeds Of An Interstate Sale.

Adams Manufacturing Company v. Storen, 304 U.S. 307 (1938), *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939) and *Freeman v. Hewit*, 329 U.S. 294 (1946), settled the proposition that the state of the seller cannot under the Federal commerce clause tax the unapportioned gross proceeds of an interstate sale.

In the *Adams Manufacturing* case it appeared that the taxpayer, an Indiana corporation, was engaged in the business of manufacturing road machinery and equipment. Its home office, principal place of business and factory were in Indiana. Eighty percent of its products were sold to customers in other states upon orders taken subject to approval at the home office.

The Supreme Court held that Indiana could not under the commerce clause tax the gross receipts from such interstate sales. The opinion states:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities

in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Sec. 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce."

In the *Gwin, White & Prince* case, the Court held that a Washington tax measured by the gross receipts of the taxpayer from its business of marketing fruit, as agent for a fruit growers' cooperative organization, shipped from Washington to customers or places of sale in various states and foreign countries was prohibited by the commerce clause of the Federal Constitution. The Court stated:

"Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed."

Freeman v. Hewit, 329 U.S. 294 (1946), the most recent case on the question, involved the attempt by Indiana, the state of the seller, to tax the gross receipts of an Indiana seller from an interstate sale of securities. Here an Indiana trustee instructed his Indiana broker to sell certain securities. The securities were sold through the Indiana broker's New York broker correspondent on the New York Stock Exchange. Upon sale the trustee delivered the securities to the Indiana broker for mailing to New York. The proceeds of sale, after deducting expenses and commission, were remitted by the New York broker to the Indiana broker and in turn to the trustee. There being no distinction under the Indiana tax law between the sale of tangible as distinguished from intangible property, the tax was struck down by the Court under the authority of the *Adams Manufacturing* case. The Court stated:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause.
>
> "This case, like *Adams Mfg. v. Storen*, supra, involves a tax imposed by the state of the seller on the proceeds of interstate sales. To extract a fair tithe from interstate commerce for the local protection afforded to it, a seller state need not impose the kind of tax which Indiana here levied. As a practical matter, it can make such commerce pay its way, as the phrase runs, apart from taxing the very sale.

* * * * * *

"It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transaction. *If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable.* But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment."
(Italics supplied).

The decision holds that the force and rationale of the *Adams Manufacturing* case had not been impinged upon by *McGoldrick v. Berwind-White Co.*, supra, upholding the right of the buyer's state to impose a sales tax upon the delivery for final consumption within the buyer's state.

In *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), the Court upheld a New Mexico tax on the gross receipts from advertising in a journal whose circulation was partly interstate upon grounds which included the fact that the tax could not be duplicated in another state. The Court stated:

"The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine. As already noted, receipts from subscriptions are not included in the measure of the tax . . . The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent."

The Supreme Court of Utah in *Whitmore Oxygen Co. v. State Tax Comm.*, 114 Utah 1 (1948), involving the applicability of the Utah Use Tax to purchases of cylinders shipped by a seller from Indiana to a Utah buyer, has correctly recognized the *Adams Manufacturing* case as constitutionally precluding the state of the seller from taxing the gross receipts of an interstate sale. The Utah Court stated:

> "Plaintiff contends that as an Indiana sale, the transaction would be subject to taxation under the Indiana Gross Income Tax Act of 1933, which is said to be a general sales tax act. However, in the case of *J. D. Adams Mfg. Co. v. Storen* . . . . . , the United States Supreme Court held the Indiana Gross Income Tax Act of 1933, as applied to the gross receipts of corporations whose income is largely derived from sales to customers in other states and foreign countries was unconstitutional.
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> * * * * * *
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> "We have before us a sale in Indiana to a customer in Utah. The sale is, then, one which the Supreme Court of the United States has said may not be taxed by the State of Indiana, under the Indiana Gross Income Tax Act of 1933. . . ."

The *Adams Manufacturing* rule is in strict accord with other precedent involving both the commerce and export clauses of the Constitution. For example, *Heyman v. Hays*, 236 U.S. 178 (1915), held that Tennessee was precluded under the commerce clause from imposing a privilege tax on a wholesale liquor business confined exclusively to filling mail orders and shipping goods to customers outside the state. The state argued that the sales were completed in

Tennessee because the carrier to whom the goods were delivered for shipment 'was the agent of the buyer'. . ." The Court replied:

> "But this is immaterial since it is not open to controversy that substance and not form controls in determining whether a particular transaction is one of interstate commerce and hence *the mere method of delivery is a negligible circumstance* if in substantial effect, the transaction under the facts of a given case is interstate commerce." (Italics supplied).

Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917), held that Pennsylvania was precluded from levying a tax on the gross receipts of a Pennsylvania seller from sales and shipments to customers in foreign countries. The Court stated:

> "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms.
>
> ". . . the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of it; and, for the same reason, to be in effect an impost or duty on exports . . . . . (citing cases)

"Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned."

From the foregoing cases, it is thus clear beyond doubt that the present tax being imposed by the state of the seller on the full gross receipts from interstate sales is invalid and unconstitutional even if it had not been established by the evidence here that the bulk (68.9%) of the sales receipts have in fact already been taxed in the buyer's state.

B.

The Tax Is Not Made Valid By The Theoretical Possibility Of Diversion To Local Use By Breach Of Contract Of The Purchaser To Haul The Goods Out-Of-State.

There remains the question whether the firm constitutional prohibition against the taxation of the gross receipts of an interstate sale by the seller's state is changed in any way by the mere fact that out-of-state delivery is effected by customer truck at respondent's expense rather than by common carrier or that the buyer might theoretically breach his contract to haul to the out-of-state job site and divert the property to local intrastate use. The cases make it plain that the constitutional protection of the commerce clause cannot be restricted to common carrier or any other particular means of transport, nor can the theoretical possibility of diversion to local use be permitted to evade the constitutional prohibition.

In *Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923), a tax on baseball bats and balls sold to Scholtz & Co., com-

mission merchants, for a foreign consignee and for the sole purpose of export, title passing on delivery to the carrier, was held invalid under the export clause. The Court stated:

> "Neither does it matter that the title was in Schlotz & Co. and that theoretically they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Co. was solely for the purpose of Delgado & Cia. and for their account and risk: *Theoretical possibilities may be left out of account.*" (Italics supplied).

Richfield Oil Corp. v. State Board, 329 U.S. 69 (1946), involved the validity of the California sales tax as applied to sales of oil to the New Zealand government, f.o.b. Los Angeles, payment in London, with delivery into the purchaser's steamer by pumping from storage tanks of seller located at the harbor. A bill of lading designated seller as shipper and buyer's agent in Aukland, New Zealand, as consignee.

The California Supreme Court, one justice dissenting, first ruled the tax unconstitutional. After rehearing it reversed its position and held the tax constitutional, two justices dissenting, on the ground that title passed to the purchaser upon delivery of the oil into its vessel and prior to the commencement of exportation. The Court indicated the oil might have been diverted to local use and that the result would have been otherwise if the delivery had been to a common carrier. Thus was presented the precise question here involved.

This Court reversed the California court and held the tax unconstitutional. The opinion states:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendors' tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and *there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use.* It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. *The means of shipment are unimportant, so long as the certainty of the foreign destination is plain.*" (Italics supplied).

To the same effect is *In Re Globe Varnish Co.*, 114 F. 2d 916 (1940) (CCA7), a commerce clause case, where a railroad with offices and freight station in Chicago ordered paint from an Illinois seller for use at its shops in Milwaukee, Wisconsin, the paint being delivered at $1.10 per gallon, f.o.b. Chicago to the buyer at its Chicago station consigned by the seller under a standard bill of lading to the buyer over the buyer's railroad to its Milwaukee shops.

The Circuit Court held the Illinois tax on the sales invalid under the commerce clause stating that under the *Adams Mfg. Co.*, *Western Live Stock* and *Gwin, White & Prince* cases, imposition of a tax by Illinois, the state of the seller, on the proceeds of sale would have subjected the sale to the risk of another tax burden in Wisconsin. The Court stated:

> "Moreover, complete title presupposes free use, control and possession by the owner or his agent, hence the Railroad's title to this property was not untrammeled as between it and the seller until the delivery was made in Milwaukee.
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> * * * * *
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> ". . . . However, as Wisconsin has the right to levy a compensating use tax on property such as here involved, Illinois, aside from the exemption, cannot validly levy a privilege tax measured by the proceeds of the sale, as this would result in two taxes upon an interstate sale, while a local sale would be subject to only one."

The Supreme Court of California in *Standard Oil Co. v. Johnson*, 147 P. 2d 577 (1944), arrived at the same result but mainly on due process grounds in a case involving California sales tax on sales of fuel oil by a California seller to the Southern Pacific Company for use on its railroad in Oregon, Nevada, Arizona and Utah. The oil was loaded into tank cars of the buyer in California and transported over the buyer's railroad, freight prepaid, under standard bills of lading showing the seller as consignor and the railroad buyer as consignee. The oil was ordered "f.o.b. points of destination as indicated in said bills of lading." The Court stated:

"We cannot hold as a matter of law, however, that regardless of the intent and conduct of the parties a taxable sale took place in California rather than in another jurisdiction because of the one circumstance that the parties did not select a carrier other than the railroad of the buyer."

The possibility of diversion to local use was held in *Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265 (1921), not to justify a West Virginia tax of 2 cents for each barrel of oil transported through plaintiff's pipe line where in fact the bulk of the oil actually moved out of state. The tax was admitted to be properly levied only with respect to the barrels actually diverted to local intrastate use. The Court stated:

"No bailor has title to any specific oil, and to deny the character of interstate commerce to the whole stream simply because some one might have called for a delivery that probably would have been made from it in an event that did not happen, is going too far."

Again, in *United Fuel Gas Co. v. Hallanan*, 257 U.S. 277 (1921), a case very similar with the case at bar, the Court held the same West Virginia tax statute as applied to gas invalid under the commerce clause *where the purchaser purchased gas in West Virginia and transported the gas through the purchaser's pipe line to points outside the state*. The portion actually diverted to local use was relatively small. The Court stated:

"Neither is the case as to the gas sold to the three companies changed by the fact that the plaintiff, as owner of the gas, and the purchasers after they receive it might change their minds before the gas leaves the

> State and that the precise proportions between local and outside deliveries may not have been fixed, although they seem to have been. The typical and actual course of events marks the carriage of the greater part as commerce among the States and *theoretical possibilities may be left out of account.*" (Italics supplied).

See also the case of *Dahnk-Walker Co. v. Bondurant*, 257 U.S. 282 (1921), (not a tax case), where the Court stated:

> "The state court also attached some importance to the fact that after the grain was delivered on the cars the plaintiff might have changed its mind and have sold the grain at the place of delivery or have shipped it to another point in Kentucky. No doubt this was possible, but it also was improbable."

Hughes Bros. Co. v. Minnesota, 272 U.S. 469 (1926), is of interest in this connection because the seller transported the property part of the distance and the buyer transported it for the remaining distance of the interstate journey. It appeared that the Minnesota seller contracted to sell timber to a Michigan buyer. The seller's headquarters were in Cook County, Minnesota through which flows the Swamp River, which empties into the Pigeon River, which empties into Lake Superior. Under the contract, seller was to deliver the timber into buyer's vessels at the mouth of the Pigeon River. The price was $12 per cord. $3 was payable on the basis of provisional measurements by buyer's inspector when the timber was cut and placed during January, February and March at river landings on or near the ice. Title to the wood on which such advances were made was to be in buyer. Another $3 was to be paid by buyer when the timber was

loaded by seller in buyer's booms at the Pigeon River mouth. The remaining $6 was to be paid after delivery at Muskegon, Michigan. Liability insurance was to be carried by seller. Cargo insurance was to be carried by buyer. The logs commenced to move when the ice broke on April 29 and by the latter part of July all timber had been shipped by buyer's vessels to Michigan. The logs were assessed to tax on May 1. The Court held, however, the timber was not taxable under the commerce clause. The Court stated:

> "*We do not think it important*, for purposes of this case, *to decide where title to the timber was at the time the drive began*. The Paper Company had an interest in the timber and so had the Timber Company.
>
> * * * * *
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> "Had the Timber Company or someone claiming under it attempted to stop the drive after it had begun, and interfered with the passage of the timber down the Swamp or Pigeon River, it would have been a breach of the contract of sale.
>
> * * * * *
>
> "*Both parties intended interstate shipment, they had bound themselves to it, the logs were segregated and were moving in the contemplated journey which neither could prevent if they carried out their agreement.*
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> * * * * *
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> "*Solution is easy when the shipment has been delivered to a carrier for a destination in another State. It is much more difficult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination*, as in the Champlain Company case.

The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. *The mere power of the owner to divert the shipment already started does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith* and temporary interruption of the passage is reasonable and in furtherance of the intended transportation; as in the Champlain case. Here the case is even stronger in that the owner and initiator of the journey could not by his contract divert the logs after they had started from Swamp River without a breach of contract made by him with his vendee, who, by the agreement of sale, divided with him the responsibility for the continuous interstate transportation." (Italics supplied).

See also: *The Pipe Line Cases*, 234 U.S. 548 (1914), where for regulatory purposes under the Hepburn Act, the transport of oil, purchased by Standard Oil Company, through its own pipe lines was held to constitute interstate commerce. The Court stated:

"That the transportation is commerce among the States we think clear. That conception cannot be made wholly dependant upon technical questions of title, and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce."

Again, in *Rearick v. Pennsylvania*, 203 U.S. 507 (1906), the Court stated:

"Commerce among the several States" is a practical conception not drawn from the "witty diversities" (Yelv. 33) of the law of sales."

The Circuit Court of Appeals in *In Re Globe Varnish*, supra, stated:

> "In the instant case, we think it makes no difference when the title passed, and we are unable to perceive how that fact, whenever it occurred, could be determinative of the character of the sale, as to whether it was an interstate or intrastate transaction."

Michigan-Wisconsin Pipe Line Co., 347 U.S. 157 (1954), is likewise another case reaffirming the principle that Texas, as the state of exit, could not under the commerce clause tax the taking and purchasing of gas *transported by the purchaser* through its own pipe line for use and sale outside Texas.

In the old case of *Coe v. Errol*, 116 U.S. 517 (1886), involving the question when logs to be floated downstream to a point outside the state come under commerce clause protection, the Court stated:

> ". . . nor are they in process of exportation nor is exportation begun *until they are committed to a common carrier* for transportation out of the State to the State of their destination, *or have started on their ultimate passage to that State.*" (Italics supplied).

The foregoing cases clearly condemn the tax here sought to be imposed by petitioner. We respectfully suggest, under the established and proven facts heretofore set forth, that it would be impossible to find or even imagine a case where the certainty of the out-of-state destination could be plainer. The product involved, namely, cast iron pipe and related fittings, is sold to and hauled by the purchaser for the sole and only purpose of being buried under a

specific piece of out-of-state ground in a specific out-of-state sewage or waterworks job in the specific sizes and lengths called for by the engineering plans and specifications. All of the contractual documents are tied into the particular out-of-state job. The material is sold for a delivered price at the job site. Respondent pays in all cases the freight to the job site. In no cases were there any breaches of contract or attempts to divert the property to local intrastate use. The bulk of the sales have been taxed in the state of destination.

In short, the only possible basis of justifying the tax here is to hold that the constitutional protection of the commerce clause is now to be restricted to a particular mode of transportation, namely, truck or rail common carrier, a mode of transportation unknown in 1787 when the Constitution was adopted and the commerce clause framed.

The effect of petitioner's attempt to impose a second tax burden on these interstate sales is to make interstate commerce bear two taxes, while intra-state commerce is required to bear but one. This is the very type of discrimination the commerce was intended to preclude.

The sales were not locally consummated by the complete, free and unrestricted delivery to the purchaser's agent of the material in Utah. By its own findings petitioner recognized the pipe was purchased through respondent's out-of-state sales agents for use on out-of-state jobs. Nor can it be denied that the contracts required out-of-state delivery to the job site, that respondent out of the delivered price

paid the freight to out-of-state destination, that buyer's truck driver took possession under a standard domestic bill of lading to haul the material to the out-of-state job site at the regular established tariff rate. This is interstate commerce, the proceeds of which are constitutionally immune from tax in Utah, the state of the seller.

C.

Infringement Of The Constitution Cannot Be Justified On Grounds Of Administrative Convenience Or On Theoretical Difficulties Of Securing Proof Of Out-Of-State Destination In Other Types Or Classes Of Cases Not Before The Court.

Only somewhat partially expressed but deeply implicit in petitioner's entire argument, is an underlying premise or assumption that administrative chaos will result if commerce clause protection is not limited to common carrier transport. It is implied that if protection is extended to include private transport to out-of-state destination by the customer, the states will then be faced with the hopeless burden of 'extracting proof and evaluating claims that a purchaser intends to use the property purchased somewhere outside of the state or that he is obliged to do so.' (Petition, p. 8).

This is essentially an argument that the meat cleaver should be permitted where the scalpel is too much trouble. It is an argument that there is no need to separate the wheat when there is admittedly a great deal of chaff. It is an agrument that this petitioner is unable to enforce Constitutional rights at the administrative level. It is inherently an argument that state tax agencies are too busy to separate

the genuine from the counterfeit, the true from the false, in the area of interstate sales of goods for out-of-state use and consumption, except where out-of-state transport is accomplished by independent common carrier.

The answer, of course, to this entire premise lies in the distinction long adhered to by this Court. On the one hand is the completely locally consummated transaction in which the purchaser's *intended* use of the property is irrelevant. In this type of transaction, the evidentiary trace of an intent by the purchaser to thereafter transport the goods out of state following purchase is likewise irrelevant. On the other hand is the true interstate sale of merchandise for out-of-state use or consumption in which the contract for its performance requires a shipment or transport of the material out of the state. Here the leaving of evidentiary traces of the transaction may be crucial.

A bill of lading evidencing the interstate shipment by common carrier, even with rights in the buyer of stoppage in transitu, has long been held sufficient proof of the interstate character of the transaction. But if the goods move interstate by private transport, protection of the state's revenue system obviously requires a different and greater degree of proof. The proof then must be manifestly certain. The distinction, however, rests on the degree of proof, not on the means of transport. The particular means of transport is only pertinent in determining whether as an evidentiary matter the proof is beyond doubt. The question cannot be the mode of carriage, whether by truck, pipeline, rail, airplane, or boat, but the certainty of proof.

The Utah Court decided the present case on its own facts, not on the facts of some other case. The proof here obviously meets the test of manifest certainty.

Petitioner finds no 'difficulty of extracting proof' of out-of-state shipment in the case of sales of motor vehicles to non-residents under this same sales tax law. The law provides that sales of motor vehicles to non-residents are exempt where not used in the state 'except as necessary to transport them to the borders of this state'. Sec. 59-15-6, U.C.A. 1953. Upon the vehicle purchaser's *affidavit* that he is a non-resident and that the vehicle "will not be used on the highways of Utah, until licensed in the state of residence, except for such travel as is necessary to transport it directly to the border of this state," (together with the seller's affidavit that he believes the purchaser to be a non-resident), petitioner issues a 96 hour temporary in-transit permit which permits the purchaser to drive or tow the vehicle free of sales tax "from the place where the vehicle was purchased to its destination by a customary route." 1962 Motor Vehicle Regulation No. 5(d).

Nor does petitioner in administering the separate sales tax laws covering motor and special fuels find any grave administrative difficulties in permitting free of tax the out-of-state shipment of motor fuels by purchaser transport. For example, the motor fuels tax law states the tax shall not apply to "sales of motor fuels actually exported from this state. . . ." Sec. 41-11-20, U.C.A. 1953. Motor Fuels Tax Regulation No. 3 includes by way of proof in support of exemption, out-of-state customer deliveries where:

"3. Delivery is made at a point in the state of

Utah to a licensed distributor or importer of another state for use or sale in that state;

"4. Delivery is made in a drum or similar container, at a point in the state of Utah to a person for use in another state."

Form TC-112, entitled "Proof of Exportation—Motor Fuel," is required to be executed to substantiate the exemption. This form is an unsworn certificate showing date of export, number of gallons, the name of the "Purchaser or Consignee," "For Use Or Sale At" blank city or town and state, seller's invoice number, and is signed for the purchaser and the seller by (blank) under the following statement:

"I certify that the foregoing is true and correct, and that this motor fuel will be for use or sale in the state specified above."

A similar rule is followed in the case of the sales tax on cigarettes exported from the state to dealers in another state. Sec. 59-18-10, U.C.A. 1953. Cigarette Tax Regulation No. 8(c) provides:

"Exempt Sales — Records

"Any person making such out-of-state sales or sales claimed to be exempt will be required to keep a record in the following form:

(1) Date of sale;

(2) Name of person to whom sold;

(3) Address to which delivered;

(4) *Method of delivery (mail, express, R. R. freight, auto, freight, other);*

(5) Quantity of merchandise shipped;

(6) Whether or not stamps were affixed to merchandise and if so, the value of stamps so affixed."

(Italics supplied)

Also of interest in the present connection is the matter of the degree or quantum of proof required by petitioner in actual practice under the present general sales tax law, to support the exemption of sales for resale. Petitioner claims that only proof of a common carrier interstate shipment will suffice to support the exemption of interstate commerce. A sale for resale, regardless of where the resale takes place, however, is exempt under the law and regulations upon the purchaser's mere representation and certificate that he is purchasing the merchandise for resale. The exemption of sales for resale is not limited by the law to sales for resale within Utah. Any purchase for resale is exempt.

Any suggestion that a state should be permitted to levy a direct and discriminatory tax on the unapportioned gross receipts of all interstate sales, regardless of the certainty of proof of out-of-state shipment and use in a particular case, except where a common carrier is involved, lacks merit.

D.

The Granting Of Commerce Clause Protection To Shipments By Common Carrier Transport From The Seller's State And Denying Such Protection To Shipments By Private Truck Transport Where The Certainty Of Out-Of-State Destination Is Equally Plain, Is Irrational And Repugnant To The

Present-Day Transportation Needs Of The Nation.

This case directly involves the status under the commerce clause of the private truck. It indirectly involves all non-common carrier forms of interstate transport because of petitioner's basic position that only common carrier shipments from the state are entitled to commerce clause protection.

The denial of commerce clause protection to interstate transport of goods by customer truck, to out-of-state point of use and consumption, we here suggest is not only inherently irrational but also repugnant to the present-day transportation needs of the nation.

We deem unnecessary to fill this brief with elaborate statistical tables to prove an experienced fact. *The economy of the United State today rides primarily on the private truck.* To single out for tax interstate shipment of goods by private transport is to cut deeply into the public interest of the United States. The free market economy of this nation cannot survive without the private truck. To now limit the commerce clause to common carrier transport is to reject the wisdom of the past, the economic realities of the present, and the technological opportunities of the future. The greatness in the commerce clause decisions of this Court, it may be suggested, may lie in the simple fact that this Court has always struck down any attempt to rob this nation's future of its Constitutional birthright.

Although accompanied by various lamentations, the hard fact is that this generation has witnessed a revolution in the transportation system of the nation whose end is not

yet in sight. The nation and the nation's goods now ride at an ever-expanding rate on rubber-tired wheels. The nation is committed to a vastly improved interstate highway system. The whole pattern of urban and industrial development is changing. The country is no longer tied to dock or railhead. The motor truck and the passenger car are responsible.

The President of the United States, in his message to Congress on The Transportation System Of Our Nation, April 5, 1962,* stated:

> *"The basic objective of our Nation's transportation system must be to assure the availability of the fast, safe, and economical transportation services needed in a growing and changing economy to move people and goods, without waste or discrimination, in response to private and public demands at the lowest cost consistent with health, convenience, national security, and other broad public objectives.* Investment or capacity should be neither substantially above nor substantially below these requirements—for chronic excess capacity involves misuse of resources, and lack of adequate capacity jeopardizes progress. The resources devoted to provision of transportation service should be used in the most effective and efficient manner possible; and this, in turn, means that users of transport facilities should be provided with incentives to use whatever form of transportation which provides them with the service they desire at the lowest total cost, both public and private.
>
> *"This basic objective can and must be achieved*

* 87th Congress 2d Session, House of Representatives, Document No. 384.

primarily by continued reliance on unsubsidized privately owned facilities, operating under the incentives of private profit and the checks of competition to the maximum extent practicable. The role of public policy should be to provide a consistent and comprehensive framework of equal competitive opportunity that will achieve this objective at the lowest economic and social cost to the Nation.

"This means a more coordinated Federal policy and a less segmented approach. *It means equality of opportunity for all forms of transportation and their users and undue preference to none.* It means greater reliance on the forces of competition and less reliance on the restraints of regulation. And it means that, to the extent possible, the users of transportation services should bear the full costs of the services they use, whether those services are provided privately or publicly.

"*For some 75 years, common carriage was developed by the intention of Congress and the requirements of the public as the core of our transport system. This pattern of commerce is changing — the common carrier is declining in status and stature with the consequent growth of the private and exempt carrier.* To a large extent this change is attributable to the failure of Federal policies and regulation to adjust to the needs of the shipping and consuming public; to a large extent it is attributable to the fact that the burdens of regulation are handicapping the certified common carrier in his effort to meet his unregulated competition. Whatever the cause, the common carrier with his obligation to serve all shippers — large or small — on certain routes at known tariffs and without any discrimination performs an essential function that should not be extinguished." (Italics supplied).

Excerpts from the President's message to Congress relative to Our Federal Pay-As-You-Go Highway Program, February 28, 1961,* are as follows:

> "Our Federal pay-as-you-go highway program is in peril. It is a peril that justifies a special message because of the vital contribution this program makes to our security, our safety, and our economic growth.
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> * * * * *
>
> ". . . By 1975 — and the Interstate System is required by Congress to have enough lanes to move safely all the vehicles expected in 1975 — there will be an estimated two or three times as many vehicles as use those roads today. Even though some expressways now seem excessively large, an emergency program then will be too late — we must continue to build those highways now at a steady rate sufficient to assure completion on schedule.
>
> "As early in the era of the automobile as 1916, Congress recognized the Federal responsibility in this area — to promote the national defense, interstate commerce, farm and resource development, and postal service. The pay-as-you-build 41,000-mile program initiated in 1956 was the most notable and farsighted recognition of this responsibility in history."

A rough statistical idea of the extent to which, as the President has stated, the common carrier has declined and the private carrier has increased, in status and stature in the transportation picture of the nation, is as follows.**

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* 87th Congress, 1st Session, House of Representatives, Document No. 96.

** The figures are from Motor Truck Facts, 1962 Edition, published by the Automobile Manufacturers Association.

In 1961, there were a total of 12,321,282 motor trucks registered in the United States representing 16.2 per cent of the total of all motor vehicles. 11,699,142 of the trucks were privately owned and 622,140 were publicly owned. Truck registrations have more than doubled since 1946 when the number was 5,986,081. In 1908 there were 1,000 privately owned trucks registered.

New truck registrations in 1961 amounted to 918,608. California led all states with 103,844 registrations. Factory sales of motor trucks and buses in 1961 totaled 1,133,304 units. 19 per cent of the trucks and bus production in 1961 was for export. 583,000 trucks and buses were scrapped in 1960.

The 1964 estimate of total motor vehicle registrations is 84,412,097, comprising 70,609,254 automobiles, 282,853 buses, and 13,519,990 trucks and combinations. Excluding publicly owned vehicles, there will be 11,690,934 private gasoline and 55,074 private diesel trucks and combinations, 1,026,897 for-hire gasoline and 98,022 for-hire diesel trucks and combinations.

In 1961, there were 30,611,839 trucks and bus registrations in the entire world of which 12,321,282 trucks and 280,686 buses, or 41.2 per cent of the total, were registered in the United States. This compares, for example, with 1,649,377 trucks and 39,465 buses in France, 1,539,000 trucks and 81,000 buses in the United Kingdom, and 3,300,000 trucks and 45,000 buses in the U.S.S.R.

Trucks haul 90 per cent of livestock arriving at major markets, 62 per cent of fruits and vegetables sold at thirty

seven leading markets, 37 per cent of refined petroleum products, 48 per cent of anthracite coal, 68 per cent of crushed stone and 88 per cent of sand and gravel. Trucks also haul 82 per cent of meat products, 82 per cent of footwear, 79 per cent of fabric mill products, 77 per cent of heating and plumbing equipment, 74 per cent of candy, 73 per cent of medicines, 70 per cent of household furniture, 70 per cent of office and store machines, 67 per cent of knitting mill products, 66 per cent of motor vehicles and equipment, 59 per cent of metal working machinery, 57 per cent of primary metals, 53 per cent of engines and turbines. The combined haul of crude petroleum and petroleum products carried by truck in 1940 was 5.7 per cent of the total. In 1960, this percentage had risen to 24.8 per cent.

In 1960, total vehicle mileage traveled by truck was 126,409 millions of miles.

In 1961, *common and contract intercity motor carriers* (not including intercity ton-miles of local carriers, local cartage or pick-up and delivery ton-miles, or ton-miles of carriers other than holders of ICC operating authorities) *hauled an estimated total of 101 billion ton-miles of freight out of a total of 305 billion ton-miles carried by both private and for-hire carriers.* The common carrier truck thus only hauled one-third the tonnage hauled by the private truck.

One out of every nine employed persons in the United States — 7,500,000 persons — depend on trucks for their livelihood. Special truck taxes paid in 1961 totaled $3,100,000,000 or one-third of the total paid by all motor vehicle users.

The regulated truck common carrier although con-

siderably behind the private truck and even further behind the railroad in ton-miles of freight carried, is nevertheless rapidly catching up with the railroads in revenues.* In 1961, the railroads received $7,858,000,000 for hauling freight, or about 47 per cent of the freight revenues received by all regulated freight carriers. The regulated motor carriers received $7,375,000,000, or about 44 per cent. The rest was accounted for by water carriers, pipelines and airlines. The trucking industry expects to pass the railroads in revenues within the next few years. The American Trucking Association estimates the value of total intercity truck business by both for-hire and private carriers at $14,200,000,000 for 1961.

The key role of the private truck in our expanding economy is not merely a matter of numbers of units or ton-miles carried. The private truck is an economic instrumentality working for the welfare of the industry to which it is an incident. It has achieved its dominant position because it improves service and lessens the cost to consumers of the products of an industry. The inability of industry to use the private truck would be a tremendous economic loss to the nation.

> "In the intangible sense, the private truck may well be considered a symbol of the freedom of enterprise. It is visual evidence that shippers, for reasons of their own, whatever those reasons might be, have elected to haul their own goods in their own vehicles; that in so doing they have exercised their inherent right

* The figures are from article by John M. Lee, New York Times, Sunday, August 5, 1962.

of freedom of choice as to the form of transportation used."*

The true picture of the vital role of the private truck in the nation's economy cannot be presented at the present time with any degree of statistical exactitude. The statistics are simply not available. **It is clear, however, as indicated in the President's message to Congress, that the transportation policy of the United States is now primarily anchored to the private carrier, even though, at the same time, the common carrier will continue to perform "an essential function that should not be extinguished."

In its historical context, it seems clear that interstate commerce cannot, without affront to reason, be limited to common carrier or any particular mode of transport. The commerce clause protects not a mode of transport but 'commerce among the several states.' Nor can it make any difference, on the reason of the thing, if a transaction is truly in fact interstate commerce, whether the subject of commerce is pushed by the seller, pulled by the buyer or hauled by a third person to market across the state line. A brief reference to the growth of transportation in the early days of the nation is pertinent here.

The Encyclopaedia Britannica, 1946, Vol. 12, in article entitled "Interstate Commerce," p. 538, states:

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* "The Private Truck Is Needed In Our Economy," By J. W. Sinclair; Highway Highlights, April, 1956.

** The Salt Lake Tribune, November 19, 1962, in an Associated Press release indicated The Census Bureau has now been given a $175,000 appropriation, which took 14 years to clear Congress, to begin a two-million dollar transportation census in 1963, the first census of transportation in the nation's history.

"Freedom of Inter-State Commerce in the United States.—The commerce passing State boundaries in the United States has become of great volume. No State imposes trade restrictions. The United States throughout its wide territory is a single commercial unit with full freedom of internal trade. In this regard the United States is in marked contrast with Europe, where racial and historical causes have brought about the existence of many nations each concerned with safeguarding its own internal trade against the undue encroachment of the commerce of other countries.

Freedom of inter-state commerce has been as great an aid to political success as to economic welfare. The commerce clause of the Constitution made a united country possible; in spite of sectional divergencies and a civil war, the nation has been held together and the States have grown into an indissoluble union because industry, trade, transport and communications have known nothing of State boundaries or of political differences."

Attention is invited to the issue of Fortune Magazine, August 1961, page 123, being Part IV of A History of American Business. Part IV deals with the development of the different means of transportation from the beginning of the Republic to more recent times. This article may be briefly summarized as follows:

In the time around 1787 the small new nation was a wilderness. The mystery is that people were able to go places without any way of getting there. After the turn of the 19th century, Eli Whitney brought in a new world of manufacturing but mass manufacture was a commercial impossibility without access to market. A product had to be

literally floated downstream or walked over Indian trails to market.

First came the toll roads, then the canals, then the rise of the river and lake steamers, and then the railroads.

The first toll road or turnpike was from Philadelphia to Lancaster under a Pennsylvania private charter of 1792. This touched off a turnpike fever which raged for 35 years. The Cumberland Road, projected by Congress in Jefferson's administration finally reached Wheeling on the Ohio "three Presidents, ten Congresses and fourteen congressional acts after its beginning."

Next came the canals, the first being short-haul waterways. The idea which became the Erie Canal went through many vicissitudes, but with the conclusion of the War of 1812, "De Witt Clinton's ditch" was approved by the New York legislature to be financed by state bonds. The digging was done with hand shovels and completed in 1825. The canal cut freight rates, shortened the time of haul, boomed land values, created new manufacturing cities from Utica to Buffalo, and created modern New York City. Other canals were built in Pennsylvania, Ohio and vital links established between the tidal rivers of the East and the surging new West.

Next came the steamboat, Fulton's Clermont having had its first successful voyage on the Hudson in 1807. Fulton went in partnership with Chancellor Livingston of New York who having envisioned the steamboat's future had obtained a monopoly for operating them in New York waters. Colonel John Stevens, launching a twin-screw pro-

peller ship, attempted to compete with Fulton and Livingston but was forced into other waters to ply between Philadelphia and Trenton, the New York-New Jersey franchise being sold to Aaron Ogden by Fulton and Livingston. However, Thomas Gibbons, a partner of Ogden, who had turned against his partner did set up his own competing service. A young man by the name of Cornelius Vanderbilt, with considerable ingenuity, skippered and kept Gibbons' vessel operating while Gibbons, with his counsel Daniel Webster, fought the first historic commerce clause case to the Supreme Court. In 1824, Chief Justice Marshall speaking for the Court held the Livingston monopoly illegal under the commerce clause. This freed the rivers of America to all men.

On the Ohio, Mississippi and the Great Lakes, the steamer created a new civilization. The 1850's were the peak years in western waters but the steamer was doomed by the 'iron horse.'

The railroad grew out of various confused beginnings, George Stephenson having demonstrated his "Locomotion No. 1" in England in 1825. The Baltimore & Ohio broke ground in 1828 for horse or sail operation. However, Peter Cooper constructed in the B. & O.'s shops the 'Tom Thumb' engine and the railroad age commenced. Its success rested on the flange wheel, Colonel Stevens' use of the 'T' rail and his son's discovery, in the winter during construction of a line across New Jersey, of the method of spiking the 'T' rails directly to wooden crossties. By 1840 there were more than 300 railway companies with a track mileage of 3,330 miles. Gauges were not uniform, brakes were still operated man-

ually and George Pullman had not yet devised his sleeping-car. After 1847, the railroad made Chicago the capital of the West.

From this time forward the course of transportation history is well known. Federal regulation of the railroads commenced with the Interstate Commerce Act of 1887. Improvements in roads, the internal combustion engine and the diesel engine have given rise to the modern truck carrier type of transport which recently also came under Federal regulation. Regulation of air transport commenced in 1926 and more especially by the Civil Aeronautics Act of 1938.

The Encyclopaedia Britannica, Vol. 12, p. 540, states:

> "The U. S. domestic commerce, most of which is inter-state, is changing constantly with the evolution of industry and industrial processes, with the shifting of the major centers of production of the leading staples of manufacture, and with improvements in transport agencies and in methods of transport. Moreover, while commerce is increasing in volume, large-scale organization of business is more and more taking the place of small enterprises."

Just as in older times the Indian trail gave way to the turnpike, the turnpike to the canal and steamer, the canal and steamer to the railroad, so in recent times does the railroad appear to be giving ground to the truck and airplane. In 1787, interstate commerce could only be viewed not as a particular mode of transportation, especially one unborn, but as a physical movement of goods across state lines in need of Federal protection. Common carrier type of transport arose with the rise of mass manufacturing and involved capital outlay neither buyer nor seller could begin

to finance. Transportation to market to a large extent thus devolved upon the independent carrier.

Recent years have seen, however, a decline in the status of the independent carrier. Faced with rising costs and keen competition, large industrial and merchandising firms purchasing and selling goods in large volume have taken over their own transport from the truck and rail common carrier. This trend will undoubtedly continue and private transport by seller and by buyer across state lines will continue to grow.

Whether the interstate transport of goods in fulfillment of an interstate sale from the state of the seller to the point of consumption in the state of the buyer, takes place by way of truck, or by pipeline, or by rail, or by boat, or by air, or by floating downstream, or otherwise, whether the particular carrier be private or common, whether the responsibility of the transport be that of the seller or of the buyer, are all irrelevant. So long as the interstate character of the transaction in truth and substance is clear, the means of shipment is unimportant. To glue the Constitutional freedom of interstate commerce to any particular mode or form of transport would be irrational and offensive to the public interest.

E.

The Sales Here Involved Were Interstate And Not Local Sales, And The Superior Oil, Wood Preserving Corporation, And International Harvester Company Cases, Relied On By Petitioner, Are Inapplicable To The Case At Bar.

From the beginning, petitioner has persisted in the attempt to convert the special facts of this case into the ordinary case of a fully consummated local sale where the purchaser, resident or non-resident, then or thereafter, with or without knowledge of the seller, merely *intends* to take the property to some other state. This, however, is not an intention case. It is a case of the interstate sale of pipe into out-of-state sewage and waterworks jobs.

Petitioner's argument rests essentially on the contention that the decision below is in conflict with *Superior Oil Co. v. Mississippi*, 280 U.S. 390 (1930), *Dept. of Treasury of Indiana v. Wood Preserving Corp.*, 313 U.S. 62 (1941), and *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340 (1944). These cases, however, are unlike the case at bar.

In the Superior Oil case, oil and gasolene were sold and delivered to fish packers at wharves in Biloxi, Mississippi. The subsequent transport by packer's boat "to the neighborhood of Grants Pass, Louisiana," for resale to shrimp fishermen, was under a fictitious bill of lading without any use or purpose other than to give a color of interstate commerce to a clearly domestic transaction. "The seller of course paid no freight." "There was no consignee at the point of destination." "There was no point of destination for delivering the oil but merely a neighborhood. . ." The "gasolene was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes." "The only purpose of the vendor . . . was to escape taxation." Two sales were involved, one to the packers and

another by the packers to the fishermen.

In the case at bar, the sale and delivery of pipe to the out-of-state job site was not under a fictitious bill of lading. It was not delivered to a 'neighborhood' but to a specific trench site for burial at a specific location on a specific sewage or waterworks job. It was not for a sale for some later resale but a sale to a contractor for a specific final use and consumption on a specific job. The seller paid the freight by crediting the established tariff rate against the delivered purchase price. There was a specific consignee at a specific point of destination. The pipe was not in the hands of the purchaser to do with as it liked but to deliver it to a specific job site where it would later be paid for out of the proceeds of a particular job. Finally, as the Utah Supreme Court stated, the documents of sale and transportation here were not "an evasive gesture to avoid taxation."

In the *Wood Preserving* case, the wood ties were sold and delivered to the railroad in a transaction fully consummated in Indiana and for a price delivered in Indiana. The subsequent shipment by the railroad of the ties outside the state for creosoting treatment by the seller's subsidiary, a separate company, was a separate transaction under a separate and distinct contract. The seller paid no freight and showing its name as consignee was of no consequence in view of the completed delivery in Indiana.

The ties were not sold and delivered to the railroad at a delivered price, including freight, to and for burial at some specifically described out-of-state job site on the rail-

road's line of track outside the State of Indiana. The sales were made on the railroad's open credit and were not to be paid for out of the proceeds of a particular job at a specific out-of-state job site. The railroad when the ties were delivered in Indiana, was free to do with the ties as it saw fit. It could have stored or creosoted or otherwise used or disposed of the ties locally.*

Likewise, in the *International Harvester* case, the Class D sales, as stipulated by the parties, involved sales by an Indiana seller of Indiana goods to an out-of-state buyer who came to Indiana, took delivery there and transported the goods to another State. The sale and delivery were fully consummated locally. There was nothing in the transaction which required either seller or buyer to transport the vehicles and implements outside the state. There was nothing in the contract which prevented the customer, whether dealer or retail purchaser, from using, storing or reselling the goods in Indiana. The sales were not at delivered prices, including freight, for delivery and use at specific out-of-state job sites. A purchaser's intention to transport the goods out-

* The petition in the Wood Preserving case for a writ of certiorari filed by the Indiana tax authorities, states (p. 43):

"The case is wholly unlike the case where the ultimate destination of the product as the goods of the buyer required delivery to the buyer across state lines. Here the delivery to the Railroad Company had been completed in Indiana, and the only shipment across state lines was for the purpose of having a service applied to the products already fully owned by the Railroad Company; and even that shipment was wholly under the control of the Railroad Company. There was no requirement created either by the contract, the character of the goods purchased, or the character of the purchaser that the ties be transported."

side Indiana (if he had such an intention) was of no concern to the seller and had no connection with the contract. A purchaser if he in fact transported the goods to his out-of-state place of business may have saved some freight but he was not *paid* freight by the seller, either in cash or by credit, to haul specific goods to a specific out-of-state destination. The *International Harvester* case is thus a pure 'intention' case.*

The interstate transportation of pipe here involved being incidental to and in furtherance of the primary construction business of the contractor-customers of respondent, constitutes private carriage under the Federal law applicable to motor carriers, whether or not the contractor happens to make a profit from the transportation activity and whether title passes to the contractor f.o.b. point of origin or point of destination. See: *Williams Bros. Corp. Cont.*

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* This is abundantly clear even in the Harvester Company's brief filed in this Court opposing appellees' motion to dismiss appeal or affirm decision of State court, which states (pp. 7-8):

"It is true that in the class D sales the buyer would have complete control of the article in Indiana, but it is absurd to think there was any practical possibility that he would do anything with it but take it back to his own home town, which he did do. If the buyer were a dealer he *intended* to take it to his place of business. If the buyer were a user he *intended* to take it to his home. He had no other place of business and he had no other home." (Italics supplied).

Appellees' reply in their statement of matters and grounds making against the jurisdiction of this Court, etc., (p. 10) was as follows:

"That the buyer intended to transport the goods purchased into another State; that the buyer intended to resell them or that the buyer had any particular intent, is therefore, wholly immaterial."

Car. App., 44 Motor Carrier Cases (ICC) 557 (Div. 5) (1945).

In *Brooks Transp. Co., Inc. v. United States*, 93 Fed. Sup. 547 (1950) (E.D. Va.), affirmed 340 U.S. 925, (also affirming *Lenoir Chair Co. Cont. Car. App.*, 51 MCC 65), the opinion of the lower Court (per Dobie, J.) states:

> "The Commission, in declaring that Lenoir and Schenley were private carriers, as opposed to contract carriers or common carriers, applied what is known as *the primary business test*. In other words, if it is established that the primary business of a concern is the manufacture or sale of goods which the owner transports in furtherance of that business and the transportation is merely incidental thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage even though a charge for transportation is included in the selling price or is added thereto as a separate item."
>
> * * * * * * *
>
> "The history of the Act, we think, completely demolishes the validity of plaintiff's *compensation* criterion and supports the Commission's criterion of primary business purpose."

The Utah Public Service Commission, not petitioner, has charge of administrating the motor vehicle transportation laws of the state and has never at any time asserted any jurisdiction to regulate or prohibit the private interstate carriage of pipe to out-of-state job sites by the non-resident (or resident) contractor-customers of respondent. Nor is there anything in the record to suggest that these contractor-customers violated in any way the safety and gross weight

provisions of the Utah Motor laws, or were interferred with in any way, either on entering or leaving the state, at the port of entry truck stations operated by the Utah Highway Patrol.

Petitioner under its Point C. does not and cannot defend the injustice and the serious competitive injury to respondent's vital interstate business of two taxes on the same interstate sale, one in the state of the buyer and now one claimed by Utah, the state of the seller. It appears to be quite immaterial here whether the tax in the state of entrance on the interstate sales receipts here involved be designated a "sales" or a "use" tax. The practical economic effect is the same. The interstate sales receipts are taxed twice, intrastate sales receipts once. None of the states in which the plants of respondent's competitors are located, whether California, Iowa, Alabama, or otherwise, attempt to tax the type of interstate customer truck shipments here involved. Most of the bids on pipe jobs involve price spreads of less than the 2 per cent Utah tax here in question. This Utah rate is now 3 per cent with the recent increase of one-half per cent State and one-half per cent County tax.

The trend throughout the country is toward an increase in sales and use tax rates. A 3 per cent Utah and a 2 per cent Colorado tax makes a combined burden of 5 per cent on the gross receipts of each sale of pipe. Competitively this puts respondent with its back to the wall. It not only has to compete with cast iron pipe but with the cheaper and less durable forms of pipe which now flood the market such as concrete, steel, and plastic pipe. The growth in urban population and the need of increased sewage and waterworks systems to handle the new housing sub-divisions

and growing suburban areas in the West, puts a heavy financial strain on municipal water departments.

Southern California is one of respondent's vital market areas where it competes chiefly with the U. S. Pipe and Foundry plant located in Northern California. The California tax is now in most counties about 4 per cent. A combined Utah and California tax would thus be 7 per cent of the gross receipts of respondent's California sales by customer truck (although there happened to be no customer truck shipments to California during this period) but only 4 per cent on U. S. Pipe's sales.

Respondent's buyers are accustomed to paying the sales or use tax of the buyer's state. They will not as a practical matter accept another billing for Utah tax and, in view of the *Adams Mfg. Co.*, case, there would be obvious difficulties in maintaining suit in courts of the state of the buyer to enforce collection of the Utah tax. At the same time, it is illegal under the Utah sales tax law for respondent to absorb the tax.

Respondent billed its Colorado customers for "Colorado tax" without specification and remitted such amounts to the Colorado Department of Revenue with its sales and use tax returns. Petitioner's suggestion that respondent erred in "volunteering" this tax to Colorado under *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327, has no merit. Petitioner itself found that all of these sales were negotiated by respondent's out-of-state sales agents. Respondent is qualified to do business in Colorado and is in essentially no different position than the *Berwind-White Coal Mining Company* was in New York State.

Respondent's plant would close up overnight if it were limited to the Utah market for pipe. It lives on its interstate business. The matter of the extension of respondent's responsibility as vendor to collect and remit sales and use taxes on all interstate sales is presently under review. The company has regularly assumed this responsibility in the states comprising its major marketing areas. During the period here involved, however, the tax payments to Arizona, New Mexico and Wyoming were handled by the non-resident buyers. The contractors involved in this type of work are normally subjected to periodic, if not in all cases specific job tax audits. Also, the jobs are not generally closed out and the retainages released by the governmental agencies to the contractors until all claims against the job have been paid. In these circumstances, the tax collection problem has not been a critical one in the states of use of the material.

Petitioner's reference to the provision in the use tax laws of a few states (including Arizona and New Mexico) exempting property where a sales or use tax has been previously levied on the property by another state, may be disposed of briefly. The National Association of Tax Administrators, the official organization of the tax and revenue departments of the several states, in its testimony on Sales and Use taxes before the Special Subcommittee on State Taxation Of Interstate Commerce,* stated:

"In the typical interstate transaction the vendor

* Hearings Before The Special Subcommittee on State Taxation Of Interstate Commerce Of The Committee On The Judiciary, House Of Representatives, 87th Congress, 2nd Session, Serial No. 20A — Sales and Use Taxes.

who ships goods to a purchaser in another state incurs no sales tax liability in the State of origin even though the sale is completed and payment is made there. Under the decisions of the U.S. Supreme Court the purchaser is protected from the possibility of multiple levies on genuine interstate sales and shipments. The legal immunity which the Court has prescribed by its interpretation of the commerce clause is thus in full accord with the economic principle that taxes on consumption should be levied only by the jurisdiction where the consumption occurs." (P. 144).

Also,

"In some jurisdictions, the taxpayer is permitted to offset his use tax liability to the extent of the amount of the sales tax he has paid in another State. This is a matter of grace, in effect a waiver by the State which really has the primary claim for the tax on goods purchased for use in that State." (P. 145).

This Court in the *Henneford* case, supra, also indicated that the right of a State to levy a use tax was not dependent upon the granting of any credit for sales taxes previously paid to another state.

By general acceptance, the sales taxes imposed by the some 34 states and numerous odd city and local governments in addition thereto, are taxes not on the seller but on the consumer. The state of market and consumption and not the state of manufacture and origin gets the tax. These credit provisions even in the states which do have them have never been interpreted to shift the primary claim of the state of market back to the state of manufacture. Such interpretation would destroy the whole philosophy and the legal and economic basis on which the taxes

were initially enacted during the 30's and upheld by this Court. They merely protect property purchased and used and taxed in one state from being again taxed on subsequent removal and use by the owner in another state. They do not as a free gift from the states of market confer back on the state of manufacture the Constitutional right to tax the proceeds of an interstate sale. This precise point was involved, for example, in the *Whitmore Oxygen* case, supra, in which the Utah Supreme Court refused to grant a credit to the Utah purchaser against Utah use tax for any tax payable to Indiana, the state of the seller, for the simple reason that under the *Adams Mfg. Co.* decision of this Court no tax was properly payable to Indiana.

This same reasoning applies to the sales here. Neither Colorado, California, Wyoming, Arizona, nor any other state, with or without such a credit provision in their use tax law, is going to permit for one minute this respondent to select which state gets the tax or recognize Utah's right, as the state of the seller, to tax the proceeds of interstate sales and the consumers of cast iron pipe within their respective jurisdictions.

II.

The Tax Here Sought To Be Levied Would Deprive Respondent Of Property Without Due Process Of Law In Violation Of Section 1 Of The Fourteenth Amendment Of The Federal Constitution.

Many of the cases raising commerce clause objections to a tax also raise the due process objection. The two questions are somewhat intimately inter-related. The primary

concern under the due process clause, however, is not the burden on the interstate commerce transaction but the extra-territorial application of the tax.

Petitioner itself found that most of the sales were negotiated by respondent's out-of-state sales agencies. There appears to be, therefore, really no answer to the contention that the present tax is void because by taxing the entire, full, 100 per cent of the gross receipts or income from an interstate transaction which occurs both within and without the State, there is a violation of the due process clause.

The customers in almost all of the transactions were out-of-state construction firms and the material purchased was paid for out of the proceeds of the out-of-state jobs. Solicitation and negotiation of the contracts and collection activity of the accounts are of necessity outside the state. The sales transaction is thus in fact rooted in two states. Yet Utah here proposes to tax respondent on the full gross income of the sales without apportioning such income within the State on some fair allocation formula. This it cannot do.

A state cannot tax income from activities or income earned outside the state. An apportionment formula must be used by the state which fairly allocates the income to business done within the taxing state. Here, without any apportionment whatsoever, Utah has allocated one hundred per cent of the gross income from the interstate sales transactions to Utah. This is error. For example, see:

Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920);

Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission, 266 U.S. 271 (1924);

Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931);

Butler Brothers v. McColgan, 315 U.S. 501 (1942).

III.

The Tax Here Sought To Be Levied Would Deny To Respondent The Equal Protection Of The Laws In Violation Of Section I Of The Fourteenth Amendment Of The Federal Constitution.

The equal protection clause relating as it does to discrimination strikes down any tax where the subject matter taxed rests on no rational or reasonable basis of classification. This is the case here.

The same material going down the same road to the same out-of-state job site under the same contractual documents is non-taxable if by respondent's trucks, non-taxable if by truck common carrier but taxable if by customer truck. There is here no reason which justifies any distinction between these classes of delivery employed by respondent to effect the interstate haul.

Further, with with respect to automobiles Sec. 59-15-6 specifically exempts:

". . . all sales of vehicles of a type required to be

registered under the provisions of the motor vehicle laws of this state which are made to bona fide non-residents of this state and are not thereafter registered or used in this state except as necessary to transport them to the borders of this state; . . .

In other words, according to petitioner's position, it is taxable interstate commerce if the Warner Bros. firm hauls purchased cast iron pipe to a job at Littleton, Colorado, from Provo, but non-taxable interstate commerce if they drive or tow a purchased truck. Or, if Warner Bros. purchases a truck in Provo to transport the pipe to Littleton, according to petitioner, the truck goes tax-free but the pipe cargo is taxable.

The classificaton here proposed by defendant as a basis for tax is so completely unreasonable and discriminatory as to be unconstitutional under the equal protection of the laws clause of the Federal Constitution. The rank discrimination here is not between the types of property being taxed but between the means of transport utilized to effect the interstate delivery of the goods, not only under this sales tax law but under the other sales tax laws administered by petitioner as mentioned heretofore.

See:

Adams v. Mississippi Lumber Co., 84 Miss. 23, 36 So. 68, (1904);

Quaker City Cab Company v. Pennsylvania, 277 U.S. 389 (1928);

Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926);

Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949).

IV.

The Tax Here Sought To Be Levied Is Invalid Under The Provisions Of The Utah Sales Tax Law And The Sales Tax Regulations Issued Thereunder.

The Utah sales tax law exempts from tax "sales which the state of Utah is prohibited from taxing under the Constitution or laws of the United States." (Sec. 59-15-6, U.C.A. 1953). The sales tax regulations defining interstate commerce provide that to constitute interstate commerce:

> "1. The transaction must involve actual and physical movement of the property sold across the state line.
>
> "2. Such movement must be an essential and not an incidental part of the sale.
>
> "3. The seller must be obligated by the express or unavoidable implied terms of the sale or contract to sell to make physical delivery of the property which forms the subject matter of the transaction across a state boundary line to the buyer."

It is, of course, clear from the facts outlined in the opinion of the Utah Supreme Court that all three of the above definitional tests are met. All of the goods moved across the state line as an essential part of the sale under contracts legally obligating the seller to make delivery to the out-of-state job sites. The transactions are, therefore, exempt from tax by reason of the Utah State Tax Commission regulations, duly issued under the statute and having the

full force and effect of state law. The question of the existence of an adequate state ground to support the decision of the Utah Supreme Court is therefore debatable.

CONCLUSION.

The Constitutional importance of the present case in its commerce clause aspect centers chiefly around the future status and stature to be accorded the private truck as an instrumentality in the conduct of commerce among the several states of the United States. A large and ever-increasing share of this commerce is now being borne by private truck transport. Some of the largest truck fleets in the nation are now under private operation. As the private truck moves over the nation's highways, crossing and re-crossing state boundary lines, and hauling the nation's goods to market or use, it leaves the same evidentiary track of its movement as the truck common carrier. The free-trade market economy of the United States needs the private truck. The private truck needs the protection of the commerce clause of the Federal Constitution. Such protection is required under the decisions of this Court.

Among all the decisions down through the years of this Court, none out-ranks in historic greatness the pre-war sales and use tax decisions. The true and full significance of those decisions in preserving our Federal system in a time of crisis is only now becoming apparent. The freedom of interstate commerce was maintained inviolate, but, at the same time, the States were permitted to breathe and live again. The Court succeeded in establishing a true harmony

between economic realities and the Constitutional necessities of a Federal-State system. In practical truth, the decisions represented a break-through which permitted the States to do that which in proposed legislation, the Congress had failed to approve.

> "Mr. Conlon. The bill as proposed back in 1934 and as passed by the Senate was practically — I say this in a pragmatic sense now — accepted by the Supreme Court decision in *Berwind-White* and related cases in 1940. One might say that the Supreme Court decided that case as though that 1934 proposed legislation was on the books." (P. 141, Subcommittee Hearings, supra; also, See p. 135).

Other testimony of the National Association of Tax Administrators showing the general fiscal importance of sales and use taxes to the States grounded on the decisions of this Court, is as follows:

> "In 1932 the sales tax was practically unknown. In 1950 at the State level it counted for roughly 21 percent of all State tax revenue. And in 1961 it accounts for about 24 percent of all State tax revenue.
>
> "Now, if you exclude motor fuel taxes which by and large are earmarked solely for highway purposes, you will find that the sales and use tax now accounts for about 30 percent of all revenue available for general State governmental purposes, and the outlook is that its relative importance in the State fiscal picture is going to increase.
>
> "Another little item of comparison, in 1961 the State sales and use taxes accounted for about twice as much as the yield of State personal income taxes, and

about four times as much as State corporation taxes.

"Now, in addition to about $5 billion in State sales and use tax revenue, there is approximately $1 billion more collected from generally imposed sales and use taxes at the local level of government. So that in the aggregate we are talking about a tax revenue that at the present time yields to State and local government about $6 billion annually.

"I think it might put the picture in a little better perspective if you compare the growth in State expenditures and the growth in State and local expenditures (just in the last decade) with the growth in Federal expenditures for all purposes except national defense and international relations. Now, roughly from 1950 to 1960, if you exclude expenditure for national defense and international relations, the Federal budget increased about $9.3 billion. . . .

"It is rather remarkable that State budgets themselves increased $9.9 billion in that same period, and if you take State and local government together, the increase from 1950 to 1960 amounted to $29 billion. So taking State and local governments together, their budgetary expenditures for general government purposes increased $29 billion in 10 years, whereas the Federal budget increased only $9 billion in that same time if you exclude expenditures for national defense and international relations and limit yourself to what might be called the general cost of the general functions of government." (P. 131-2, Subcommittee Hearings, supra).

All of this has been accomplished under the sanction of this Court and on the basis that the state of market and not of manufacture is the one entitled to the tax.

We ask the Court to affirm the decision of the Utah Supreme Court which, in accord with the decisions of this Court, condemns imposition of a sales tax directly on the unapportioned gross receipts of interstate sales by the state of the seller.

Respectfully submitted,

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